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ABORIGINAL CONSTITUTIONAL MATTERS

Streamlining Government Policy:

A Brief to the Task Force

To Review Comprehensive Claims Policy

I.C.N.I.

MONTREAL, Quebec

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Streamlining Government Policy: A Brief to the Task Force To Review Comprehensive Claims Policy.

This paper was originally submitted to the Federal Government Task Force to Review Comprehensive Claims Policy. ICNI is now tabling the document for the information of the various parties involved in the constitutional process.

We hope that this document will provide participants with a broader view of the importance Inuit attach to developing Aboriginal Self-Government as a positive and workable component of the Canadian system. In the paper, ICNI recommends that the Federal Government accept and clearly articulate Self-Government as the overriding objective in all initiatives and policies regarding Aboriginal Peoples, and specifically those related to the Land Claims Process, Community Negotiations, and the current Constitutional Reform Process. The paper also strongly argues that this approach, and the subsequent streamlining of government policy and in various process, cannot be fully realized without the appropriate amendments to the Canadian Constitution.

February, 1986

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STREAMLINING GOVERNMENT POLICY:
A BRIEF TO THE TASK FORCE
TO REVIEW COMPREHENSIVE CLAIMS POLICY

submitted by:
The Inuit Committee on
National Issues.

October, 1985.

SELF-GOVERNMENT AS A STARTING POINT

The crucial role of self-government as a key principle in government policy-making, has been forcefully stated by the Prime Minister in his opening statement at the 1985 First Ministers Conference:

> "The key to change is self-government for aboriginal peoples within the Canadian federation. -- It is not an end in itself, but rather a means to reach common goals. It is the vehicle, not the destination. The challenge and satisfaction is in the journey itself.
>
> "The federal government's approach to self-government for aboriginal peoples takes account of these realities, of the inventiveness and creativity that Canadians have always shown in developing their democratic institutions. It is through self-government that a people can maintain the sense of pride and self-worth which is necessary for productive, happy lives. (Opening statement, p.6)

While that Conference ended without explicit recognition of a self-government right in our Constitution, it confirmed the significance placed on this issue by all participants in the constitutional renewal process. Self-government will, of course, remain on the agenda for future First Ministers

Should self-government become the overall principle in all federal initiatives regarding the aboriginal peoples, there would be profound repercussions on many of the existing processes, including land claims. In the sections which follow, these implications will be more fully outlined.

THE IMPACT OF SELF-GOVERNMENT ON LAND CLAIMS

Prime Minister Mulroney, in his speech of April 2nd, listed a number of federal initiatives which in his words, are "leading to increased self-government and to increased well-being." (opening statement, p.7) It is not surprising that he included in this list an undertaking by the Minister of Indian and Northern Affairs to re-examine the land claims policy with the aim of "giving consideration to alternatives to current policy."(p.8) From this, it is evident that the government has come to recognize that land claims is an important vehicle by which significant contributions can be made to the development and implementation of forms of aboriginal self-government, even though this has never been explicitly acknowledged within the policy itself.

Of all the routes to self-government, it is in the area of claims policy that the principle of self-government most requires express articulation. A clear acknowledgement is needed that self-government is an overall goal which applies to the claims process.

rights...and may include self-government on a local basis." (see p.19) This is manifestly contradictory -- political matters within negotiations are rejected on the one hand, and local self-government is grudgingly accepted on the other.

This contradiction in policy regarding political matters has had, and continues to have serious repercussions on Inuit. The ITC and later TFN land claims proposal has had to be revised in the light of government intransigence over territorial self-government as part of a claims agreement. The model of self-government worked out within the James Bay and Northern Quebec Agreement is, by common consent, seriously defective. A reorientation of the government's policy based on self-government would surely encourage discussions leading to revived regional government to become better adapted to Northern Quebec needs and conditions. Labrador Inuit have endeavoured for many years to obtain a commitment from the governments concerned to have self-government discussed within the claims forum and only recently has this commitment been made.

By clearly articulating self-government as the major goal of all processes, including land claims, the federal government would bring its policy into line with the needs and aspirations of the aboriginal peoples. It would also provide for viable terms of reference for a wide range of issues that would be negotiated.

Reform along the principles advanced above would have beneficial effects on negotiations dealing with the off-shore. The government has not elaborated a policy on the off-shore with respect to claims; this would be a crucial opportunity for the Task Force to make recommendations on this matter. Inuit concerns in the off-shore, the sea-bed, the waters and its resources would be met by conferring management and decision-making powers through the institutions of self-government which a reformed claims policy would provide for.

The final and, the most important, consequence of negotiating land claims subject to the principle of aboriginal self-government is that it would be fully consistent with recent developments -- legislative, judicial, and constitutional -- over the last few years. The constitutional reform process since 1983 has given clear focus to aboriginal interests and aspirations. The attention given discussions at the First Ministers Conferences have highlighted aboriginal issues for the Canadian public. Consequently, public opinion is now more open to envisaging various forms of aboriginal self-government.

Furthermore, entrenchment of section 35, the 1983 constitutional amendments, and the near-success of the 1985 Conference on entrenching self-government, have given strength to aboriginal rights and claims. Finally, the Supreme Court, in the 1984 Musqueam band decision, has signalled a change in the

Bill C-52, An Act relating to Self-government for Indian Nations, was explicitly drafted to deal with self-government for Indian peoples "on lands reserved for Indians". If the bill had been passed, it would have set in motion a process for recognition of Indian governments. We are aware that some Indian bands are currently negotiating special legislation respecting self-government on their reserves.

Community negotiations, a process first discussed in the section 37 process and developed in the Proposed 1985 Accord, are also directed at self-government in relation particularly to the Metis. The various clauses in the Accord would have set in motion a process for negotiating the institutional arrangements relating to self-government.

While a consistent, unified approach to aboriginal peoples based on self-government will benefit the claims process more than the legislative or community-based processes, it will have specific advantages for all such initiatives. Government and aboriginal negotiators in all these forums would have the opportunity to know in advance basic policy guidelines. Clearly, each process will be suited to the particular needs and conditions of each aboriginal people, yet a uniform policy will immeasureably aid the successful pursuit of negotiations in all such processes.

Second, the existing constitutional framework does not adequately protect Inuit and other aboriginal peoples engaged in the various processes. The scope of the term "land claims agreements" within subsection 35(3) is by no means certain. Although ICNI certainly advocates far-reaching reform in land claims policy, any sweeping change may paradoxically leave open to doubt whether the resulting agreement would qualify under s.35(3). No court decision has been pronounced on the meaning of "land claims agreements". Should judges look to historical practice in treaty-making over the last 200 years, as well as the original intent of the contemporary lands claims policy, a fairly restrictive interpretation of the phrase may emerge. It does not seem appropriate to ICNI to base recommendations on reform without keeping in mind this very real possibility. (The various legal arguments on this issue have been thoroughly canvassed by Professor Bryan Schwartz in his study; see for a discussion on the possible judicial reactions, his chapter on the treaty-making process in First Principles: Constitutional Reform with respect to the Aboriginal Peoples of Canada 1982-1984, (Queen's University, 1985), at 273-279.)

Third, while ICNI recommends that political rights be dealt with in the land claims forum, specific conditions of political development in Nunavut for example, may well preclude all elements of self-government from being covered by a land claims agreement. The Tungavik Federation of Nunavut has recommended

it may be decided that their respective interests regarding self-government may more properly be addressed in another forum, or more specifically, through a process whose end result will not be threatened by restrictive interpretations of what may be eligible for constitutional protection.

ICNI has proposed amendments to the Constitution allowing for a right of self-government, a process of negotiation, and the protection of the results thereof. This would protect agreements on self-government from unilateral legislative action. In this manner, our proposed amendments would have fully covered the needs of Inuit with respect to self-government, as the current constitutional provisions cannot guarantee that all aspects of Inuit self-government will be fully protected within the confines of a land claims settlement. The Task Force cannot discount the fact that ICNI's proposals have, to some extent, been adopted by the federal government and have achieved near success at the last First Ministers Conference.

It is accordingly necessary that the Task Force, in formulating its recommendations, recognize that in order to successfully articulate self-government as an overriding policy objective in all processes, the government will have to remain committed to pursuing constitutional amendments that will: (1) overcome the uncertainty surrounding the scope of section 35(3) of the 1982 Constitution Act, and (2) entrench the explicit right and a process of self-government in the Constitution.

RECOMMENDATIONS

1. The Federal Government should clearly articulate that Self-Government is the overriding objective in all policy concerning Aboriginal Peoples. Comprehensive claims policy must be formulated accordingly, and with the understanding that the full realization of this policy objective will result in an amendment to the Canadian Constitution entrenching the right of the Aboriginal Peoples to Self-Government.

2. In accordance with this major policy objective of Aboriginal Self-Government, the comprehensive claims process should no longer exclude negotiations concerning political development. However, nothing in the land claims policy or process should preclude or block negotiations resulting from the entrenchment of the right of Aboriginal Peoples to Self-Government.

3. Comprehensive claims agreements should affirm rather than extinguish aboriginal rights and title. The policy of surrender of aboriginal title and extinguishment should be eliminated, and the issue of aboriginal title and its exercise should be resolved through negotiation in accordance with the policy objective of Aboriginal Self-Government.